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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1932.

No. 137.

AETNA LIFE INSURANCE COMPANY, a Corporation, in Its Own Right and Also to the Use of Anna Roberts, in Her Own Right and as Administratrix of the Estate of Henry Roberts, Deceased, and Harry M. Bralove, an Individual, to the Use of Aetna Life Insurance Company, a Corporation, *Petitioners*,

vs.

SAMUEL D. MOSES, an Individual, *Respondent*.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

MERRITT U. HAYDEN,
SEFTON DARR,
H. CLAY ESPEY,
GEORGE MONK,
JAMES O'D. MORAN,
Attorneys for Respondent.

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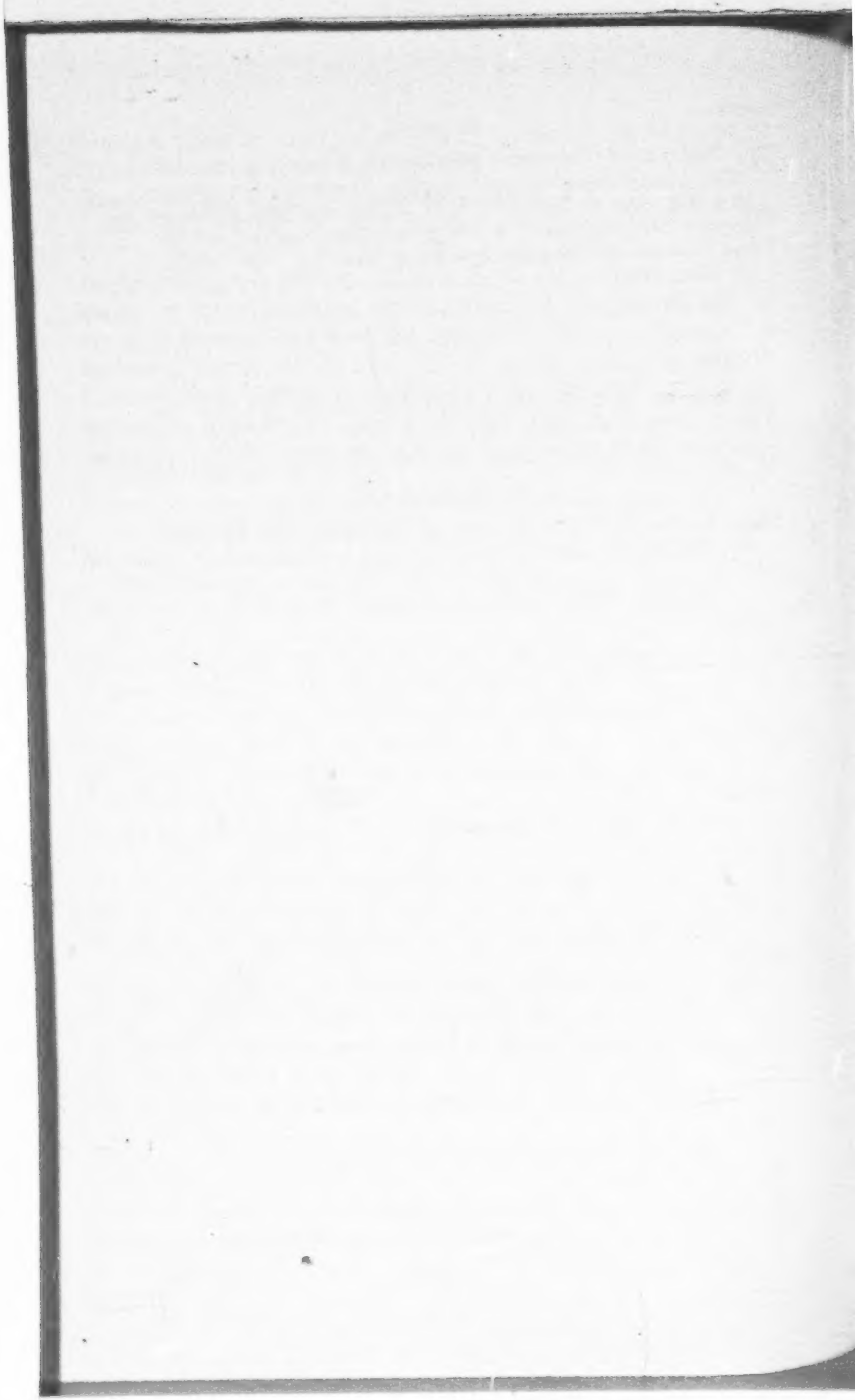

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vs.

SAMUEL D. MOSES, an Individual, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The memorandum opinion filed in the cause in the Supreme Court of the District of Columbia (R. 16) is not reported.

The opinion of the Court of Appeals of the District of Columbia was rendered March 7, 1932 (R. 22), and is reported in 57 F. (2d) 440.

JURISDICTION.

The judgment of the Court of Appeals of the District of Columbia was entered March 7, 1932 (R. 28). The petition for a writ of certiorari was filed June 6, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Who are the proper party or parties plaintiff in an action brought in the District of Columbia against a third party whose negligence caused the death of an employee whose widow accepted compensation in accordance with the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. at Large 1424; made applicable to the District of Columbia by Act of May 17, 1928, c. 612, 45 Stat. 600)?

STATUTES INVOLVED.

The statutes involved are set out in the Appendix (infra, pages 20 to 22).

STATEMENT.

The petitioners in their brief have correctly detailed the statement of the case, and in that connection it is thought necessary only to call attention to the fact that this statement says that this case involves the construction and interpretation of Section 33 (a) (b) (d) and (e) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424) as applied for the purposes of a workmen's compensation act for the District of Columbia (Act of May 17, 1928, c. 612, 45 Stat. 600). It is the contention of the respondent that this case also involves the construction and interpretation of the District of Columbia's "Lord Campbell's Act" as provided in Code D. C. 1924, c. 45, Secs. 1301, 1302, and 1303, as well as the construction and interpretation of the District of Columbia's Workmen's Compensation Act.

Attention is also called to the fact that the Supreme Court of the District of Columbia, in sustaining the motion of the defendant (respondent herein) to strike out the declaration of the plaintiffs (petitioners herein), granted leave

to the plaintiffs to amend within twenty days (R. 17), and that the plaintiffs did not take advantage of this permission.

For the purpose of clarity, we shall hereafter refer to the petitioners as plaintiffs and to the respondent as defendant.

SUMMARY OF ARGUMENT.

I. The question here presented involves merely a formal matter of pleading, and does not affect the substantive rights of the parties. Whether or not an assignee of a chose in action may be a legal party plaintiff does not affect his substantive rights in the least. The rights of the plaintiffs were not prejudiced because as the trial court gave the plaintiffs leave to amend, they could have done so by naming the proper parties plaintiff, and proceeded with the cause.

II. The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence caused the death of another. A new cause of action for wrongful death of an employee against a stranger to the employment is not created by the District of Columbia's Workmen's Compensation Act.

III. Harry M. Bralove, employer, and Aetna Life Insurance Company are not proper legal parties plaintiff. Although under the District of Columbia's Workmen's Compensation Act, Harry M. Bralove as employer is a statutory assignee, he is not a proper legal party plaintiff, as an assignee may not sue in his own name without special statutory authority. Aetna Life Insurance Company is not a proper legal party plaintiff as assignee under the subrogation clause in the insurance policy for the same reason, and also because both an unliquidated tort claim for dam-

ages and an action for wrongful death are unassignable without special statutory authority.

IV. Anna Roberts, individual, is not a proper use plaintiff because the District of Columbia's "Lord Campbell's Act" permits only the personal representative to be a party plaintiff in an action under it. The Aetna Life Insurance Company is not a proper use plaintiff because the cause of action, attempted to be assigned, is unassignable.

V. The instant case is not in conflict with decisions in other federal courts because it is evident that federal courts all hold that at common law an insurance company as indemnitor or as assignee is not a proper legal party plaintiff. Moreover, it is possible for other courts to reach other conclusions because the law of the forum governs as to whether an assignee may sue in his own name or not.

VI. The administratrix of the deceased employee should be the only proper legal party plaintiff, and the employer Harry M. Bralove may be the only use party plaintiff. "Lord Campbell's Act" provides a right of action for death caused by wrongful act of another, and names personal representative as proper person to sue. The District of Columbia's Workmen's Compensation Act assigns part or all of this cause to the employer of the deceased employee, but fails to give him the right to sue in his own name. Therefore, the personal representative is the only proper legal plaintiff, and the employer might be the only proper use plaintiff.

ARGUMENT.

I.

The question here presented is of minor importance as it involves merely a formal matter of pleading in the Supreme Court of the District of Columbia, and does not affect the substantive rights of the parties.

It is the defendant's contention that this suit is brought under the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03) as modified by section 33 of the District of Columbia's Workmen's Compensation Act. Section 33 (b) of the District of Columbia's Workmen's Compensation Act provides: "Acceptance of such compensation shall operate as an assignment to the employer of *all right of the person entitled to compensation to recover damages against such person.*" (Italics supplied).

Paragraph "c" of the same section has no application to the present case because it provides what shall happen in the event of payment into a fund established by another section of the Compensation Act.

The italicisized quotation from the Compensation Act makes it clear that the employer, as assignee, receives the same right as the person entitled to compensation had. The Compensation Act does not set up any new cause of action in any one. The inquiry is, then, what right has the "person entitled to compensation". No right existed at common law, but the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03) conferred a right to sue for death by wrongful act, specifically described the person entitled to bring suit, and specifically set the limit of recovery at $10,000.00. The Workmen's Compensation Act has not changed this right, except that it assigns the right of the "person entitled to compensation" to the employer.

From the wording of the Workmen's Compensation Act, it is not quite clear whether Congress intended to assign only the distributive share of the "person entitled to compensation" or the entire amount recoverable by the personal representative of the deceased. This question, however, is not raised in the present case. The plaintiffs have appealed from an order sustaining a motion to strike out the declaration, the ground of which motion was, in substance, misjoinder of plaintiffs. The two legal plaintiffs, namely, Aetna Life Insurance Company and Harry M. Bralove, are entitled to bring suit under any theory as assignees only. Whether an assignee may sue in his own name or not is merely a question of form. The fact that the assignee of a chose in action is not a legal plaintiff does not affect his substantive rights. At common law, the legal title to a chose in action was in the assignor, and suit was filed in his name as a legal plaintiff, even though the assignee had a complete beneficial ownership and could completely control the action. *Welch* v. *Mandeville,* 1 Wheat. 233, 4 L. Ed. 79; *Irvine* v. *Lowery,* 14 Peters 293, 10 L. Ed. 462; *Karrick* v. *Wetmore,* 22 App. D. C. 487.

In sustaining the motion to strike out, the lower court gave the plaintiffs leave to amend within twenty days (R. 17). The plaintiffs could have amended the declaration by naming the proper parties, and proceeded with the action without prejudice to the rights of any assignee or beneficial owner of the cause of action. The plaintiffs, however, elected to stand on their declaration.

II.

The administrator or executor of the deceased is the only proper party plaintiff in an action in the District of Columbia against a third party whose negligence has caused the death of the deceased.

The only action at law for a wrongful death occurring in the District of Columbia is provided in the District of Columbia's "Lord Campbell's Act", Code D. C. 1924, c. 45,

secs. 1301-03 (with the exception of the Employers' Liability Act which is not applicable here because it applies only to common carriers). The "Lord Campbell's Act" specifically provides that suit shall be brought by and in the name of the personal representative of the deceased. The personal representative of the deceased has been held to be the executor or administrator of the deceased, and no other. *Fleming* v. *Capital Traction Co.*, 40 App. D. C. 489; *Ferguson* v. *Railroad Co.*, 6 App. D. C. 525.

The plaintiffs contend that section 33 of the District of Columbia's Workmen's Compensation Act creates a new cause of action at law for wrongful death. *Hyde* v. *Southern Railway*, 31 App. D. C. 466, cited by plaintiffs to sustain this contention, is no authority. The statute involved in that case was an Employers' Liability Act which provided, as quoted on page 468 of the opinion: "That every common carrier . . . shall be liable to any of its employees, or, in case of his death, to his personal representative, . . . for all damages which may result from the negligence of any of its officers . . . ". This language clearly created a new cause of action. There is no language in the District of Columbia's Workmen's Compensation Act creating any new liability in a person not standing in the relation of employer to the deceased.

The mere fact that "Lord Campbell's Act" and the Workmen's Compensation Act seem inconsistent in places, is not material. The Compensation Act was designed principally to afford an adjustment of the rights and obligations of employers and employees, principally the latter; it was not intended to disturb the liabilities of strangers to the employment. *Silvia* v. *Scotten*, 32 Del. 295, 299, 122 Atl. 513. It would be far-fetched to hold that in view of the inconsistencies, a new cause of action arises against a negligent stranger to the employment for the reimbursement of the employer and his insurance carrier, where there is absolutely no language in the Compensation Act creating such new cause of action.

If, as plaintiffs contend, the Compensation Act creates a new cause of action against a third person who negligently kills an employee covered by the Compensation Act, then such third person would be subjected to a double liability for such wrongful death: (1) under the Compensation Act; and (2) under "Lord Campbell's Act". It is not likely that Congress intended such a result.

The plaintiffs' claim of damages in this suit is $10,000.00. The plaintiff Aetna Life Insurance Company is not able to sue for $10,000.00 as the limit of its liability is $7,500.00, nor would the plaintiff Harry M. Bralove have the right to sue for $10,000.00 as the limit of his liability is the same as that of the insurance company. Section 14 (m) of the District of Columbia's Workmen's Compensation Act. There is, therefore, an excess of $2,500.00, and, in order to recover for that, the plaintiffs must rely upon the District of Columbia's "Lord Campbell's Act" (Code D. C. 1924, c. 45, secs. 1301-03). Consequently, the suit is apparently brought under "Lord Campbell's Act" as modified by the Workmens' Compensation Act. "Lord Campbell's Act" is complete in itself, for it provides for a definite limit of recovery, provides for the plaintiff who shall bring the suit, and provides for the distribution of the verdict. The Workmen's Compensation Act could not, even by its expressed terms, authorize a suit for more than $7,500.00. "Lord Campbell's Act" is, therefore, involved in this suit and must be considered in determining the questions raised.

III.

Harry M. Bralove, employer, and Aetna Life Insurance Company, the insurance carrier, are not proper legal parties plaintiff in this action.

As, in any event, the liability of the defendant is based either upon the Workmen's Compensation Act or upon "Lord Campbell's Act", or both, the defendant's liability

is entirely statutory, and is not based upon the common law. The defendant's liability is, therefore, subject to the principle that statutes in derogation of the common law are to be construed strictly. *St. Louis, I. M. & S. R. Co.* v. *Craft,* 237 U. S. 648, 655, 59 L. Ed. 1160; *Ross* v. *Jones,* 89 U. S. 576, 591, 22 L. Ed. 730; *Brunswick Terminal Co.* v. *National Bank,* 192 U. S. 386, 390, 48 L. Ed. 491.

In *St. Louis, I. M. & S. R. Co.* v. *Craft, supra,* the court said on page 655: "By the common law, the death of a human being, although wrongfully caused, affords no basis for a recovery of damages, and a right of action for personal injuries dies with the person injured . . . . Therefore, in cases like this, the right of recovery depends entirely upon statute law."

Although the Workmen's Compensation Act assigns to the plaintiff employer, Harry M. Bralove, the right of the person entitled to compensation, it nowhere gives him express authority to bring a suit in his own name. He is, therefore, not a proper legal plaintiff, because an assignee may not sue in his own name without special statutory authority. *Glenn* v. *Marbury,* 145 U. S. 499, 36 L. Ed. 790; *Taylor* v. *Anderson,* 275 U. S. 431, 72 L. Ed. 354; *Metropolitan Coach Co.* v. *Freund,* 42 App. D. C. 283; *Commercial National Bank* v. *Consumers' Brewing Co.,* 16 App. D. C. 186; *Armstrong, Witworth & Co.* v. *Norton,* 15 App. D. C. 223.

In *Glenn* v. *Marbury, supra,* at page 509, the court said:

> "a chose in action is not assignable so as to authorize the assignee to sue at law, in his own name, unless the right to do so is given by a statute, or by settled law, in the jurisdiction where the suit is brought. This is the well-established rule of the common law, and the common law touching this subject governs in the District of Columbia."

The common law on this subject has been changed in the District of Columbia only to permit the assignee to sue in his own name where a judgment or certain contract actions

are assigned. Unliquidated tort claims are unmentioned. This was done by Act of Congress on March 3, 1901, Code D. C. 1924, c. 11, secs. 431-434.

In view of the principle stated above, the Aetna Life Insurance Company also is not a proper legal plaintiff. The Compensation Act does make an assignment to the employer, but it makes no assignment to the insurance carrier. The plaintiffs contend that there is a statutory assignment to the insurance carrier on the ground that "employer" and "carrier" are used synonymously. The Compensation Act nowhere expressly states that these terms are interchangeable as do compensation acts in some states. It is significant that section 35 of the District of Columbia's Workmen's Compensation Act, in imposing the obligations of the employer on the carrier, does not confer the rights of the employer on the carrier. The employer, Harry M. Bralove, has at best an unliquidated tort claim for damages against the defendant. Regardless of whether or not the Workmen's Compensation Act created a new cause of action, and whether or not the employer could assign his claim to the insurance carrier, the assignment to the Aetna Life Insurance Company by virtue of the subrogation clause in the insurance policy of Harry M. Bralove with the Aetna Life Insurance Company would not permit the Aetna Life Insurance Company to sue in its own name without special statutory authority. *Glenn* v. *Marbury, supra.*

Moreover, Bralove's unliquidated tort claim for damages resulting from personal injuries could not be transferred to the Aetna Life Insurance Company, as it has long been the rule in the District of Columbia that an action for personal injuries is not assignable. *Lamont* v. *Washington & Georgetown Railroad Co.*, 2 Mackey 502, 47 A. R. 268.

Even if, as the plaintiffs contend, a new cause of action is created by the Workmen's Compensation Act, it is none the less a cause of action for death wrongfully caused by

another. In the absence of statute, an action for wrongful death is not assignable. *Southern Pa. Co.* v. *Winton,* 27 Tex. Civ. App. 503, 66 S. W. 477; *Marsh* v. *W. N. Y. & P. Railway Co.,* 204 Pa. 229, 53 Atl. 1001.

Therefore, the employer Bralove's claim against the defendant is not assignable; and if it were, the Aetna Life Insurance Company would not be entitled to sue in its own name.

Neither the employer Bralove nor the Aetna Life Insurance Company may be a proper legal plaintiff under District of Columbia Supreme Court Equity Rule No. 13, which is to the effect that every action shall be prosecuted in the name of the real party in interest, and which rule is practically the same as Rule No. 37 of the Rules of Practice for the Courts of Equity of the United States. Equity Rule No. 13 merely states an established rule of equity practice, in force in the District of Columbia before even assignees of contract claims could sue in their own names at law. *Young* v. *Kelly* (1896), 3 App. D. C. 296. The statute permitting assignees of liquidated contract claims to sue in their own names (Code D. C. 1924, c. 11, secs. 431-434), was not enacted until 1901. Before this statute was passed, it was definitely established in the District of Columbia that no assignee could sue in his own name at law. *Glenn* v. *Marbury, supra.* It was certainly not the intention of the Supreme Court of the District of Columbia that Equity Rule No. 13 should apply to actions at law. To hold that all plaintiffs in the present case are properly joined by reason of Equity Rule No. 13 would be to revolutionize the present practice followed in the District of Columbia which is to the effect that an assignee cannot sue at law in his own name unless expressly permitted by statute, and further to the effect that an unliquidated tort claim cannot be assigned. If it had been the intention of the Supreme Court of the District of Columbia to make a rule permitting the real parties in interest or assignees to sue in their own names at law, that court would have done so by

expressly making a law rule to that effect, rather than by merely stating in written form as an equity rule an old established rule of equity practice. Certainly, the decision of the trial court in the present case is an indication of the District of Columbia Supreme Court's interpretation of Equity Rule No. 13 as applied to actions at law, and further is an indication of the practice followed in that court.

Moreover, it is doubtful whether the District of Columbia Supreme Court would have the power to make a rule permitting assignees of any nature and all parties having an interest in the subject of the action to join as plaintiffs in an action at law. It was absolutely well-established law in the District of Columbia before the statute passed in 1901 (Code D. C. 1924, c. 11, secs. 431-434), that no assignee could sue as a legal paintiff. By Act of Congress in 1901, assignees of judgments and of liquidated contract claims were expressly authorized to sue in their own name. This Act of Congress, by enumerating the types of claims that could be assigned, excluded by implication types of claims not enumerated. A rule of court cannot repeal a statute or regulate a matter already regulated by statute. *Hamilton* v. *Fowler,* 83 Fed. 321, 326; *Schnitzer* v. *Stein,* 96 Oregon 343, 189 Pac. 984. A rule of court cannot broaden a statute. *Nissen* v. *Flaherty,* 117 Maine 534, 105 Atl. 127. A rule of court cannot be in contravention of the common law or the law as declared in numerous decisions of the court. *DeLorme* v. *Pease,* 19 Georgia 220, 227; *Huff* v. *Shepperd,* 58 Mo. 242, 246.

It is, therefore, difficult to understand how a rule of the Supreme Court of the District of Columbia could extend the right to any kind of assignee to sue in his own name, or could permit any person who might benefit financially to be a party plaintiff in a suit for wrongful death under "Lord Campbell's Act".

Very few cases decided under compensation acts in other jurisdictions are authority for the propositions involved

in this case. Hardly any two compensation acts are alike. Cases decided under state compensation acts are decided under the language of such acts, which is generally different from that of the Workmen's Compensation Act of the District of Columbia, and also are decided under the established principles of law of each state. Wherever a state court permits an employer or insurance company to recover in its own name, the act makes provision accordingly. *Silvia* v. *Scotten, supra; Insurance Co.* v. *Railways,* 39 Cal. App. 388, 178 Pac. 974; *Henderson Tel. & Tel.* v. *Owensboro Home T. & T.,* 192 Ky. 322 (1921), 233 S. W. 743; *Texas and P. R. Co.* v. *Archer* (1918), Texas, 203 S. W. 796; *Jordan* v. *Orcutt* (1932), Mass., 181 N. E. 661.

IV.

Anna Roberts, individual, and Aetna Life Insurance Company are not proper use plaintiffs in this action.

The only possible interest that Anna Roberts can have as an individual is that she would be entitled to receive from herself as administratrix her distributive share of any recovery in excess of $7,500.00. In other words, her interest is that of one of the next kin of her deceased husband. Under the terms of the District of Columbia's "Lord Campbell's Act", and the decisions construing it, the personal representative is the only proper plaintiff in an action brought by virtue of this act. "Lord Campbell's Act" is remedial, and must be strictly construed, and, therefore, even if District of Columbia Supreme Court Equity Rule No. 13, which provides that any person having an interest in the subject of the action may be joined as a party to the action, is given full force and effect, yet the definite and clear terms of the statute will at once override the rule, and so far as the excess of damages over and above $7,500.00 is concerned, Anna Roberts, individually, has no

right or cause of action, and, therefore, cannot file a suit, or be joined as a party plaintiff, as at common law, she had no interest, and under the statute, the person to bring the suit for the benefit of the next of kin is clearly set forth.

The Aetna Life Insurance Company is not a proper use plaintiff either as an attempted assignee of an unliquidated tort claim for personal injuries, *Lamont* v. *Wash. & Georgetown Railroad Co., supra,* or as an attempted assignee of an action for wrongful death, *Southern Pa. Co.* v. *Winton, supra, Marsh* v. *W. N. Y. & P. Railway Co., supra.*

V.

The instant case is not in conflict with the Kokusai Kisen Kabushiki Kaisha, 44 Fed. (2d) 659, or with any other rule long settled in the Federal Courts.

It is the plaintiffs' contention that plaintiff Aetna Life Insurance Company takes a right of action as legal subrogee of the assured as indemnitor under the Workmen's Compensation Insurance Policy issued by it to plaintiff Harry M. Bralove, and that, therefore, the Aetna Life Insurance Company is a proper legal plaintiff. In the case of *Southern Railway Co.* v. *Blunt & Ward,* 165 Fed. 258, the court said on page 260:

> "It is a general rule of law that, where an insurer pays to the assured the total amount of the loss, such insurer is subrogated by operation of law to all of the assured's rights of action against third persons who are responsible for the loss. The insurer's title arises, or is derived, from the assured alone, and can only be enforced in the right of the latter. *In a court of common law, this right of subrogation can only be asserted in the name of the assured, but in a court of equity or admiralty, the insurer can prosecute the action against*

the third party in its own name or right." (Italics supplied).

The court further said on page 262: "If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone in the name of the railway company as the nominal plaintiff for the use of the insurance company."

Southern Railway Co. v. *Blunt & Ward, supra,* follows the rule expressed in *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co.,* 139 U. S. 223, 35 L. Ed. 154, where on page 235, the court said, in speaking of an insurance company's right of action as indemnitor: "By the strict rules of common law, it must be asserted in the name of the assured; in a court of equity or of admiralty or under some state codes, it may be asserted by the insurer in his own name."

Thus, it is quite evident that under the principles of these cases, neither the employer nor the insurance carrier as indemnitors is a proper legal party plaintiff, and at best can be only a use party plaintiff, if the principles of these cases were applicable to the present situation which involves a statutory cause of action for the wrongful death of another.

In the instant case, the question whether or not the Aetna Life Insurance Company has the equitable or beneficial ownership of the chose in action against the defendant has not been raised. The defendant merely objected that the Aetna Life Insurance Company was not a proper legal party plaintiff.

Under the *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co., supra,* and *Southern Railway Co.* v. *Blunt & Ward, supra,* both of which hold that at common law an insurance company as indemnitor is not a proper legal party plaintiff, and under *Glenn* v. *Marbury, supra,* which holds that at common law an assignee is not a proper legal party plaintiff, it is difficult to understand how the lower courts

erred in holding that the Aetna Life Insurance Company could not be joined as a legal party plaintiff.

The case of the Kokusai Kisen Kabushiki Kaisha, 44 Fed. (2d) 659, was correctly decided because in admiralty it has long been held that the equitable or beneficial owner of a chose in action or the assignee of a chose in action may sue in his own name. *St. Louis, I. M. & S. R. Co.* v. *Commercial Ins. Co., supra; The Propellor Monticello* v. *Mollison,* 17 Howard 153, 15 L. Ed. 68; *The Liberty No. 4,* 7 Fed. 226.

The case of *Liverpool and Great Western Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 32 L. Ed. 788, cited on p. 20 of the plaintiffs' brief accompanying their petition for a writ of certiorari, as further authority that the insurance company is a proper legal plaintiff, was likewise correctly decided because it, too, was in admiralty.

The decision in the case of *Travelers' Ins. Co.* v. *Great Lakes Engineering W. Co.,* 184 Fed. 426, is not inconsistent with that of the present case. In the first place, the court mentions the common law rule that the right of an insurance company for subrogation must be enforced in the name of the assured, but said that under the Ohio statute permitting a suit to be brought in the name of the real party in interest, the insurance company was a proper legal party plaintiff. Moreover, in that case, a "Lord Campbell's Act" was not involved, as the right of action subrogated to the plaintff Travelers' Insurance Company was an employer's common law right of action against his servant for negligence causing loss to the employer.

Even though the District of Columbia's Workmen's Compensation Act is a re-enactment of the Longshoremen's and Harbor Workers' Compensation Act, the former is, nevertheless, merely a local law applicable to the District of Columbia alone. It is quite possible for District of Columbia courts to reach results in regard to subrogation suits against third parties whose negligence or wrong-

doing has caused the death of a employee, which subrogation suits are brought by virtue of section 33 of the District of Columbia's Workmen's Compensation Act, different from results reached by either federal or state courts in other jurisdictions in regard to subrogation suits against third persons brought by virtue of section 33 of the Longshoremen's and Harbor Workers' Compensation Act, which section is exactly the same as section 33 of the District of Columbia's Workmen's Compensation Act. The "right of the person entitled to compensation" subrogated or assigned to the employer by section 33, and the manner of suing on the subrogation or assignment of this right in the District of Columbia by the employer or his assignee or indemnitor would be determined by District of Columbia law. The law of the forum governs as to whether an assignee may sue in his own name or in that of the assignor. *Glenn* v. *Marbury, supra; Pritchard* v. *Norton,* 106 U. S. 124, 130, 27 L. Ed. 104.

The instant case is an action at law in the District of Columbia, where rules of common law pleading are unchanged by statute insofar as this cause of action is concerned.

VI.

Who are the proper parties plaintiff?

The administratrix of the deceased employee is the only proper legal party plaintiff, and the employer may be the only proper use plaintiff. "Lord Campbell's Act" gives a cause of action for negligence causing death. It is the settled law of this jurisdiction that only the personal representative of the deceased may sue under this act. The Workmen's Compensation Act makes an assignment of either part or all of this statutory cause of action to the employer of the deceased employee, but fails to give him authority to bring the suit in his own name. Therefore,

the personal representative is the proper legal plaintiff, and the employer may be a proper use plaintiff. The other plaintiffs, Aetna Life Insurance Company and Anna Roberts in her own right, are neither proper legal nor proper use plaintiffs.

The case of *Luckey* v. *Union Pacific Railway Co.*, 117 Nebr. 85 (1928), 219 N. W. 802, is extremely pertinent on this point, and was decided under statutes very similar to those in this jurisdiction. In that case, the administrator of the deceased employee filed suit against the third person, the employer and the carrier of the employer, which carrier had become liable to pay compensation. The Nebraska "Lord Campbell's Act" provided that the action should "be brought by and in the name of his personal representative for the exclusive benefit of the widow or widower and next of kin."

The Nebraska Compensation Act provided (as quoted in the opinion):

> "Where a third person is liable to the employer or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation."

On appeal by the third person, the court held that such action must be brought in the name of the decendent's personal representative; that the Workmen's Compensation

Act did not create a new cause of action against a third person for negligently causing the death of another, nor authorized the widow of a deceased workman, nor the dependents, nor the administrator, nor the employer, to bring or prosecute such action. The court distinguished the situation where the employee was injured from the situation where the employee was killed, saying that in the former, the Compensation Act permitted the employer to bring suit in his own name against the third person.

In the light of the District of Columbia statutes involved, and the decisions cited herein, it is manifest that the lower courts reached a proper conclusion in holding that there was a misjoinder of parties plaintiff.

If any plaintiffs, legal or use, were improperly joined, the lower courts did not err in sustaining defendant's motion to strike out the declaration for misjoinder of plaintiffs.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

MERRITT U. HAYDEN,
SEFTON DARR,
H. CLAY ESPEY,
GEORGE MONK,
JAMES O'D. MORAN,
Attorneys for Respondent.

APPENDIX.

STATUTES.

The relevant portions of the District of Columbia Workmen's Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; made applicable to the District of Columbia by the Act of May 17, 1928, c. 612, 45 Stat. 600) are as follows:

Sec. 14 (33 U. S. C. 914) . . .

(m) Total compensation payable under this chapter for injury or death shall in no event exceed the sum of $7,500.00.

Sec. 33 (33 U. S. C. 933). COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recoevred by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 907 of this chapter.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

The District of Columbia "Lord Campbell's Act" is as follows, Code D. C. 1924, c. 45 (D. C. Code, 1929, Title 21, c. 1, secs. 1-3):

Sec. 1301. LIABILITY.—Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or if the person injured be a married woman, having entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars: *And provided further*, That no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

Sec. 1302. BY WHOM SUIT TO BE BROUGHT.—Every *such* action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

Sec. 1303. DISTRIBUTION OF DAMAGES.—The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed according to the provisions of the statute of distribution in force in the said District of Columbia.

The District of Columbia Code 1924, c. 11 (D. C. Code, 1929, Title 2, c. 1, secs. 1-4), provides as follows:

Sec. 431. JUDGMENTS.—A judgment or money decree may be assigned in writing, and upon the assignment thereof being filed in the clerk's office the assignee may maintain an action or sue out a scire facias or execution on said judgment in his own name, as the original plaintiff might have done.

Sec. 432. BONDS.—Any bond or obligation under seal for the payment of money may be assigned under the name and seal of

the obligee therein named, and the assignee may maintain an action thereon in his own name.

Sec. 433. NONNEGOTIABLE CONTRACTS.—All nonnegotiable written agreements for the payment of money, including nonnegotiable bills of exchange and promissory notes, or for the delivery of personal property, all open accounts, debts, and demands of a liquidated character, except claims against the United States or the salaries of public officers, may be assigned in writing, so as to vest in the assignee a right to sue for the same in his own name.

Sec. 434. GENERAL ASSIGNMENTS.—In case of a general assignment which shall include choses in action, it shall not be necessary to execute a separate assignment of each chose in action, but the assignee shall be entitled, by virtue of the general assignment, to sue in his own name on the several choses in action included therein.